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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/662,783	09/15/2003	Thomas E. Yingst	DKE 9734	9519
321	7590	03/23/2007	EXAMINER	
SENNIGER POWERS ONE METROPOLITAN SQUARE 16TH FLOOR ST LOUIS, MO 63102			SHAPIRO, JEFFERY A	
			ART UNIT	PAPER NUMBER
			3653	
SHORTENED STATUTORY PERIOD OF RESPONSE		NOTIFICATION DATE	DELIVERY MODE	
3 MONTHS		03/23/2007	ELECTRONIC	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Notice of this Office communication was sent electronically on the above-indicated "Notification Date" and has a shortened statutory period for reply of 3 MONTHS from 03/23/2007.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

uspatents@senniger.com

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/662,783	YINGST, THOMAS E.
Examiner	Art Unit	
Jeffrey A. Shapiro	3653	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 17 January 2007.

2a)  This action is **FINAL**.                            2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

4)  Claim(s) 40-50 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 40-50 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All    b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.  
4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_.  
5)  Notice of Informal Patent Application (PTO-152)  
6)  Other: \_\_\_\_\_.  
\_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 1/17/07 has been entered.

### ***Claim Rejections - 35 USC § 103***

2. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. **Claims 40-50** are rejected under 35 U.S.C. 103(a) as being unpatentable over Perzon in view of Fukushima et al (JP 401315559 A) and further in view of Rhoads (US DES 188,719).

5. **Regarding Claim 40**, Perzon discloses a product server (1), the product server having a transparent breath guard/cover (2), said product server being cooled (see abstract), said breath guard/cover being able to be rotated/pivoted through an angle of between 0 and 90 degrees. See figures 1-3.

Note that looking at figure 1, the employee/server side is construed to be near the side lower left, proximate the cover handles. Therefore, when the employee opens the cover as shown in figure 1, access is provided therein. The transparent covers (see col. 2, lines 60-64) in the raised position act as breath guards when in the open position, preventing customers from breathing directly onto the frozen items stored in the freezer. When in their lowered, generally horizontal position, the covers protect and seal the items kept inside the freezer. The covers are pivotally attached to the freezer at the "customer side". See figure 2.

When open, the covers extend upward toward the rear employee side of the freezer/server. See figure 1.

**Regarding Claim 40**, Perzon does not expressly disclose, but Fukushima discloses using a gas spring/ "first power assist device" (1) and a damper cylinder/ "second power assist device" (2) in combination as a lifting assist device for a cover/door (3), for the purpose of decelerating the cover near the final closing location.

See Fukushima, abstract and constitution as well as figures 1 and 2.

**Regarding Claim 41**, note that Fukushima's first power assist device (1) has a vertical force component that increases as the cover is raised.

**Regarding Claim 42**, note that Fukushima's first power assist devices necessarily operate such that the cover must be opened initially with manual assistance, and after a particular intermediate point, the first power assist device lifts the cover to its final location. This is apparent in Fukushima's figure 4, in which 4a and 4b illustrate positions which require more manual effort while 4c illustrates a position which requires little or no manual effort.

**Regarding Claims 43 and 45**, note that Fukushima's second power assist device comprises a piston (24), cylinder (23) and rod (25) having cylinder and rod connections with the cover/breath guard, as illustrated in figures 9 and 10. Note flow-restricting orifice (28) in figure 10.

**Regarding Claim 44**, note that Fukushima's first power assist device and second power assist device can be construed to be in substantially the same positions as Applicants' first and second assist devices based on reading the employee side to be in front of cover (3). Additionally, note that having either the first or second assist devices between the other device and the employee side of the product server are considered functional equivalents which are obvious to substitute for each other.

**Regarding Claim 46**, note that a ball and socket connection is considered a functional equivalent to Fukushima's cylinder and rod connections and are obvious substitutions of each other.

**Regarding Claim 47**, note that it would have been a matter of design choice as to what angular range is required for Perzon's breath guard, based upon the lengths and widths of said breath guard to cover a particular volume.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to have incorporated a first and second assist device to assist in lifting Perzon's freezer doors, as taught by Fukushima, for the purpose of improving the safety of operation of Perzon's apparatus. See Fukushima's abstract, constitution and figures.

**Regarding Claim 48**, Perzon does not expressly disclose, but Rhodes discloses a countertop surface adjacent the employee side of the product server in figures 1 and 2.

**Regarding Claims 43 and 49**, Perzon does not expressly disclose, but Rhodes discloses an upper frame extending up from the cabinet near the front customer side, said upper frame comprising upright side frame members on opposite sides of the upper frame, and side panels on the upright side frame members at opposite sides of the upper frame, said breath guard being disposed between said upright side frame members and between said side panels when the breath guard is in its raised and lowered positions. Again, see figures 1-6 of Rhodes, which clearly discloses the features listed in claims 35 and 36.

**Regarding Claim 50**, Perzon does not expressly disclose, but Rhoads discloses a serving cabinet having an upper frame with shelves. See figure 1, for example.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to have incorporated an employee side serving counter, shelf and associated frame members in Perzon's freezer, as taught by Rhodes.

One ordinarily skilled in the art would have been motivated to add a serving counter to Perzon's freezer for the purpose of providing space to prepare items for customers, as is apparent from Rhodes' figures.

One ordinarily skilled in the art would also have been motivated to add a shelf with associated left and right frame members above Perzon's freezer, for the purpose of supporting finished items for customers to obtain access thereto.

#### ***Response to Arguments***

6. Applicant's arguments with respect to Claims 40-50 have been considered but are moot in view of the new ground(s) of rejection.

Perzon discloses a freezer product server that has a transparent cover, which, when in its raised position, prevents a person on the opposing side from breathing on the items in the product storage area. As discussed above, Perzon reads on most of the independent and dependent claims. Fukushima provides teaching and motivation to include first and second assist devices connected to the cover and with the server frame: See above. Rhoads provides teaching to incorporate a shelf and associated frame above the opened cover so as to place objects important to completing a sale in a convenient position, as well as an employee side counter attachment. See above.

Ultimately, Perzon's cover is structurally the same as called for by Applicant's claims. Therefore, Applicant's claims remain rejected as delineated above.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey A. Shapiro whose telephone number is (571)272-6943. The examiner can normally be reached on Monday-Friday, 9:00 AM-5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick H. Mackey can be reached on (571)272-6916. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

*JAS*  
JAS  
March 19, 2007

*ZH*  
PATRICK MACKEY  
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